

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

ePLUS, INC.,

Plaintiff,
v.
LAWSON SOFTWARE, INC.,

Defendant.

: Civil Action
: No. 3:09CV620
: January 11, 2013

COMPLETE TRANSCRIPT OF CONFERENCE CALL
BEFORE THE HONORABLE ROBERT E. PAYNE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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25

1 (The proceedings in this matter commenced via
2 telephone at 11:00 AM.)

3
4 THE COURT: Hello. This is ePlus against
5 Lawson and this is 3:09CV620. Please give your name,
6 who you represent, starting with counsel for the
7 plaintiff, and, if you would, give your name when you
8 speak so the court reporter can make the proper
9 entries.

10 All right?

11 MR. MERRITT: Good morning, Your Honor.
12 Craig Merritt and Paul Jacobs at Christian & Barton on
13 behalf of ePlus.

14 MR. ROBERTSON: Your Honor, this is Scott
15 Robertson with Goodwin Proctor. And I believe I have
16 Ms. Jennifer Albert and Mr. Michael Strapp on the
17 phone as well.

18 THE COURT: Well, that means they're
19 obviously not in the same room with you.

20 Are you on the phone, Ms. Albert and
21 Mr. Strapp?

22 MS. ALBERT: Ms. Albert is here, Your Honor.

23 MR. STRAPP: And Mr. Strapp is here as well.

24 THE COURT: Okay. Thank you.

25 MR. CARR: Judge, this is Dabney Carr from

1 Troutman Sanders. And I also have on the line Dan
2 Thomasch, Josh Krevitt and Chris Dusseault from Gibson
3 Dunn.

4 THE COURT: All right. Hold on.

5 (Brief recess.)

6 THE COURT: All right, ladies and gentlemen.
7 I'm sorry to interrupt. I just want you to know that
8 I have my priorities straight. I had to take that
9 call from my vet so that I could dispense some more
10 money. And if any of you had any sense and could do
11 it from an age standpoint, you'd quit practicing law
12 and go into veterinary medicine for you'd make at
13 least as much money and not have nearly as much
14 stress.

15 MR. MERRITT: Your Honor, this is Craig
16 Merritt. I just dropped my dog off this morning to
17 get a \$54 haircut, and I'm going to go get a \$15
18 haircut if I can get one today.

19 THE COURT: All right. I got this letter
20 from you, Mr. Thomasch, and, frankly, it was in that
21 letter, Mr. Robertson, that I realized that you all
22 had filed a petition for rehearing. And I realize
23 your papers you filed in, I think, November or
24 December on the injunction and the contempt scope
25 issues said that you might, but you may have notified

1 us, and I didn't pick it up.

2 And I don't know if any of you have had this
3 problem with the Clerk of the Federal Circuit, but two
4 times now I've had them tell me they don't issue
5 mandates, which I think is contrary to the Federal
6 Rules. But on one of the occasions when I had that
7 conversation they did issue a mandate and on the other
8 one they didn't.

9 And I'm not quite sure what's going on up
10 there. That's just a long way of saying I wasn't
11 aware that there was pending a petition for rehearing
12 and, as I see it, if they do issue a mandate, I mean
13 if their practice is to issue a mandate in dispositive
14 cases, then the filing of a petition for rehearing
15 stays the issuance of the mandate.

16 Is that right, Mr. Robertson?

17 MR. ROBERTSON: You are correct, Your Honor,
18 that we have filed a petition for rehearing with
19 regard to Claims 28 and 29. If you look at our
20 papers, particularly our reply papers on the
21 injunction and the scope of it, Claim 26 has now been
22 affirmed, and Lawson has been adjudicated as --

23 THE COURT: I understand that and I've read
24 the petition for rehearing, Mr. Robertson. I got
25 that.

1 Are they going to issue a mandate, according
2 to your understanding, at all until they decide the
3 petition for rehearing on that part of the case?

4 MR. ROBERTSON: They're not going to issue a
5 mandate until they decide that aspect of the case,
6 Your Honor.

7 THE COURT: All right.

8 MR. ROBERTSON: But we don't require a
9 mandate. The cases that we cited in our reply brief,
10 and in particular I think this was at page 8 of our
11 injunction brief with respect to *MPT* and *Broadcom v.*
12 *Qualcomm*, courts have enforced their injunctions
13 immediately upon a decision from the Federal Circuit.
14 And this injunction of Your Honor, if I might refresh
15 you, it's been outstanding now for 20 months.

16 THE COURT: Mr. Robertson, let me assure you
17 that this is the oldest case on my docket, so I
18 certainly am aware of all of this. I also don't
19 question that the contempt proceeding can go on. The
20 question is: Given what you raised in your papers,
21 does it make any sense to go forward until the
22 rehearing is decided? That way you can decide all of
23 the issues at the same time. That's the question.
24 It's not whether I can, but should I.

25 MR. ROBERTSON: Well, I respectfully would

1 suggest, Your Honor, that you should because for 20
2 months our position is Lawson has been in contempt of
3 your injunction order and it's been making a lot of
4 money with respect to that, and you certainly have the
5 authority. In fact, Mr. Thomasch's letter doesn't
6 cite any authority that says you can't move forward,
7 and I understood Your Honor to say you've been moving
8 forward with regard to several of these matters.

9 So the only thing that is impacted is one
10 configuration out of the three infringing
11 configurations that the jury found to infringe. And
12 so we want them to stop infringing those two
13 configurations.

14 There's not even an argument --

15 THE COURT: Excuse me just a minute, Ms.
16 Robertson. Try it this way: Do you contend that what
17 Lawson is doing would give rise to a claim for
18 contempt different than the one or in addition to the
19 one that you have pending presently in the event the
20 Federal Circuit grants your petition for rehearing and
21 affirms your view on the claims that are at issue in
22 the petition for rehearing? In other words --

23 MR. ROBERTSON: Yes, sir.

24 THE COURT: -- we'd have another contempt
25 hearing going, wouldn't we?

1 MR. ROBERTSON: We already have two
2 configurations that are indisputably in violation of
3 Your Honor's order.

4 THE COURT: I understand that. You don't
5 need to tell me the obvious. I've read it. Here,
6 look. Try this technique. Try focusing just on the
7 question instead of trying to -- here's the narrow
8 issue that I'm trying to get at seven ways from Sunday
9 and I'm not doing a very good job of it.

10 Obviously, we have two affirmed claims as to
11 which you think they are in contempt because they
12 continue to violate the injunction. There is pending
13 in the Court of Appeals another issue now, and that
14 affects other claims, 28 and 29 of the '683 Patent.
15 Is it your view that what Lawson is doing with its
16 modified product would give rise to a contempt
17 proceeding on which you would contend that they have
18 been violating the injunction, period?

19 MR. ROBERTSON: Let me answer that question,
20 Your Honor. I'm sorry if I have been obtuse.

21 The answer is it doesn't implicate the two
22 configurations that are already infringing under claim
23 26, which was affirmed as infringed, not invalid.

24 THE COURT: Yes, I know that one. That one I
25 understand. But am I going to have a contempt claim

1 for this one? The theory would be, I guess, they
2 accuse the new modified product would infringe the
3 injunction between the time it was issued and the time
4 the Federal Circuit issued its opinion holding that
5 those claims were invalid. And then if the Federal
6 Circuit takes your view of things, then that claim
7 would be reactivated and back in the picture, but as
8 it stands now, there could be no contempt for
9 violating the injunction on what's before the Federal
10 Circuit because the Federal Circuit held that claim
11 was invalid. And I guess all I want you to do is tell
12 me do you think their accused product would have
13 infringed, the modified product, the claims that are
14 at issue in the Federal Circuit's petition that it's
15 got in front of it; yes or no?

16 MR. ROBERTSON: Yes. First of all, Your
17 Honor, we can't get double recovery on damages. All
18 they need to do is infringe one valid claim and that's
19 what we have. And so even if we had to revisit it, it
20 would be in summary fashion, which I don't even think
21 we would need to do, and so we would want to proceed
22 with enjoining the two configurations that are subject
23 to the affirmed invalid and infringed claim, and you
24 would be done, and this would be the way to finally
25 achieve hopefully some closure to this long, pending

1 case on your docket.

2 THE COURT: All right. I understand.

3 All right, Mr. Thomasch, what's your
4 position? I guess what he's saying, Mr. Thomasch, is
5 that he wants to go forward with the contempt
6 proceeding on the two claims as to which the circuit
7 affirmed.

8 MR. THOMASCH: It's one claim, Your Honor,
9 claim 26 of the '683 Patent, which was found to be
10 infringed.

11 THE COURT: Yes, it's two configurations.

12 MR. THOMASCH: And I think the simple
13 question is: If at the contempt proceeding, as we
14 believe there will be a finding of no contempt, at
15 that point are we, in fact, done if the Federal
16 Circuit ultimately grants the petition for
17 reconsideration and rules in ePlus's favor or will
18 ePlus at that point seek to come back for a further
19 contempt proceeding with respect to Configuration
20 No. 2 or with respect to the non-infringed claims of
21 Configuration No. 1? If they want to come back for a
22 second bite at the apple, then I don't understand
23 going forward now.

24 Right now we're dealing with Configuration 3
25 and 5, which represent about 1/20th of the total

1 number of customers that were originally in the case.
2 Configuration 2 was a much bigger configuration. And
3 I would expect that if they were to prevail with
4 regard to that configuration, they would want to come
5 back and try a contempt proceeding. But if they are
6 foreclosing that, that's a different situation, Your
7 Honor. But I think the real question is: If we win,
8 as I expect we will, on claim 26 at a contempt
9 proceeding, does that end it or do they then want to
10 come back in the event they win in the Federal
11 Circuit?

12 THE COURT: And the answer to that,
13 Mr. Robertson, is? Choose a three-letter word or a
14 two-letter word.

15 MR. ROBERTSON: I'm sorry, sir?

16 THE COURT: Choose a three-letter word or
17 two-letter word as your answer; i.e., yes or no.

18 MR. ROBERTSON: I'm not sure what the
19 question is.

20 THE COURT: The question is: If they win,
21 are they through, or if they win, are they going to
22 face another contempt proceeding?

23 Mr. Thomasch, isn't that it?

24 MR. THOMASCH: Yes, in the event that the
25 contempt proceeding occurs and thereafter the Federal

1 Circuit rules in Mr. Robertson's client's favor.

2 THE COURT: Right. Yes or no?

3 MR. ROBERTSON: We're going to win in the
4 contempt proceeding because --

5 THE COURT: Wait a minute. We have a failure
6 to communicate. I haven't heard "yes" or "no" yet.

7 MR. ROBERTSON: Sorry, Your Honor. I don't
8 know whether it's yes or no because I'm not quite sure
9 of what the question is. Please tell me one more
10 time.

11 THE COURT: Assuming the Federal Circuit
12 rules for you on your petition for rehearing and
13 assuming that on the extant contempt claims Lawson
14 prevails, will we be through?

15 MR. ROBERTSON: If I win on the appeal and I
16 lose on contempt, will we be through? I suppose the
17 answer is yes, Your Honor.

18 THE COURT: So you are not then going to come
19 back and try to have a contempt hearing on the newly
20 resurrected claims on which you will have prevailed in
21 the Federal Circuit on your petition for rehearing; is
22 that right?

23 MR. ROBERTSON: But I would like my
24 injunction that the Court granted enforced because if
25 I prevail in the appeal court, that would mean your

1 original injunction was proper and appropriate and --

2 THE COURT: Yes, I understand that, but
3 there's a period of time between the issuance of the
4 injunction, the reversal on appeal, in which they were
5 conceptually, if you have prevailed on your petition
6 for rehearing, were violating the injunction by
7 selling the product that contained the affirmed
8 features or the features which went your way on
9 appeal.

10 So he's concerned, I think Mr. Thomasch is
11 concerned, whether or not he's going to face a
12 contempt hearing for sales as to Configuration 2, is
13 it, Mr. Thomasch?

14 MR. THOMASCH: Yes, Your Honor.

15 THE COURT: In that period of time. Isn't
16 that what you're concerned about, Mr. Thomasch?

17 MR. THOMASCH: My concern is whether I face a
18 contempt proceeding on sales of Configuration 2 at any
19 point in time, Your Honor, because there will not be a
20 discussion of that at a contempt hearing that occurs
21 now.

22 THE COURT: Yes.

23 MR. ROBERTSON: So let me stipulate, Your
24 Honor, right now we think they have been infringing
25 and continue to be in violation of Your Honor's order

1 on Configurations 3 and 5 since May of 2011, 20
2 months. So we want to move forward on that and
3 enforce Your Honor's order and seek the contempt
4 damages on that.

5 And with regard to Configuration 2, until and
6 unless the Federal Circuit rules and grants my
7 petition for rehearing with regard to that, we will
8 waive any damages.

9 THE COURT: Okay. That solves your problem
10 on that point, doesn't it, Mr. Thomasch?

11 MR. THOMASCH: Not, not at all, Your Honor.
12 He just said "until and unless" he waives any damages.
13 He can't waive damages. Right now the Federal Circuit
14 has found that the only claim that Configuration 2
15 infringes, claim 1 of the '172 Patent, is invalid. If
16 it turns out that on reconsideration the Court were to
17 reverse itself, I don't expect it, but if that were to
18 happen, then Mr. Robertson has just said unless and
19 until when that happens, he wants to come back and
20 then have a contempt hearing about Configuration 2.
21 He wants serial bites at the apple.

22 MR. ROBERTSON: No, no, that's not what I
23 said.

24 THE COURT: He really didn't say that, Mr.
25 Thomasch. And I didn't take it to mean --

1 MR. THOMASCH: Your Honor, with all due
2 respect, he has not answered the question yes or no,
3 which is if we win the contempt proceeding on claim
4 26, does that under all circumstances end contempt or
5 does he reserve a right under some set of
6 circumstances to come back for an additional contempt
7 proceeding.

8 MR. ROBERTSON: Look, if the Court rules that
9 we do not prevail on contempt, of course, we, like all
10 the parties, have the right of appeal. But the point
11 is, the Judge asked me, you know, would I waive
12 damages with regard to claim 1 of the '172 during the
13 interim period --

14 THE COURT: As to Configuration 2.

15 MR. ROBERTSON: -- and I said I would.

16 THE COURT: All right. As to Configuration
17 2.

18 All right. Here we go.

19 MR. THOMASCH: This is Mr. Thomasch. May I
20 add one more thought? The issue still comes we have
21 not dealt with the question of from May 23, 2011,
22 until today. That situation, right now that is not at
23 issue if we have a contempt hearing in March of this
24 year, that is not going to be at issue. But if the
25 Federal Circuit were to reverse itself and say that

1 claim 1 of the '172 Patent is infringed, I don't
2 understand that Mr. Robertson has waived his right to
3 seek damages under a contempt theory during that time
4 period. If he has, I've simply misunderstood. But I
5 think he's been very clear to be talking about waiving
6 damages during a little sliver of time. I'm concerned
7 about going back to May of 2011.

8 If he is reserving the right for a second
9 contempt hearing about that time period, then Your
10 Honor should at least be aware of that fact. I think
11 that that means we should not have serial contempt
12 hearings.

13 MR. ROBERTSON: Judge, I'm sorry if I have
14 not made myself clear to Mr. Thomasch, but I hope I've
15 made myself clear to you with respect to claim One of
16 the '172 Patent.

17 THE COURT: As to the Configuration 2.

18 MR. ROBERTSON: Yes, sir. But we are seeking
19 enforcement of your injunction at the earliest
20 opportunity with respect to Configurations 3 and 5.
21 It's been 20 months and we don't want to wait any
22 longer. We're prepared to discuss dates with you,
23 Your Honor, and, obviously, we understand you're very
24 busy. But we have contacted our experts and we are
25 prepared to move forward on contempt because the Court

1 clearly has jurisdiction and authority to enforce its
2 injunction.

3 THE COURT: All right. Now, I think I
4 understand where we are, but, in any event, I'm going
5 to leave to the law since you two can't seem to listen
6 to what each other are saying and really address it
7 directly. Each of you want to try to get in some
8 other point rather than just addressing a simple
9 point. And so I'm going to leave to the future and to
10 the law the question whether ePlus could claim or
11 proceed on contempt for a violation of the injunction
12 from the date it was issued until the date the Federal
13 Circuit decided its case, issued its first opinion
14 invalidating that which is referred to as
15 Configuration 2. I'll just leave that for the future.

16 I have jurisdiction over contempt proceedings
17 as to Configurations 3 and 5, and I'm going to
18 schedule those, and I'll just abide the event and see
19 what happens in the event the Federal Circuit goes the
20 other way.

21 Now, I do have this question: Has the
22 Federal Circuit called upon Lawson, Mr. Thomasch, to
23 submit a response to the petition for rehearing in a
24 particular time frame?

25 MR. THOMASCH: No, Your Honor.

1 THE COURT: It is that Court's practice to
2 ask for responses if it wants them or are you entitled
3 to file a response as a matter of course to a petition
4 for rehearing or rehearing en banc in that circuit?

5 MR. THOMASCH: We are not to file a response
6 until and unless we hear from the Court. We've not
7 yet heard from the Court.

8 THE COURT: All right.

9 MR. ROBERTSON: Your Honor, if I might just
10 address that. I just had a recent experience where I
11 was on Mr. Thomasch's side of the issue. And the
12 practice of the Court almost universally is to require
13 a response. I attended a CLE practice where one of
14 the circuit judges said that it's 90, 95 percent.

15 Now, having said that, my chances of getting
16 a petition for rehearing, I want to be candid with the
17 Court, are very slim, as you might imagine. So I'm,
18 you know, frustrated by the fact that I thought we
19 presented overwhelming evidence with regard to the
20 claims that were not found to be infringed for the
21 cross-referencing on the UNSCSC, which I thought we
22 had done at great length, but, you know, that's an
23 appellate court. They get a dry record and they, you
24 know, call balls and strikes. So that's where we're
25 at.

1 I anticipate they are going to require a
2 response and that's going to involve, you know, some
3 delay, but we want to move forward on the affirmed
4 claim 26, which the Federal Circuit said was clearly
5 infringed by both Lawson and its customers.

6 THE COURT: All right. I understand, I
7 think, the positions of the parties on that point.

8 On the question of -- I want to use the right
9 term. I believe the Federal Circuit said for us to
10 consider what, if any, modifications needed to be made
11 in the injunction.

12 Is it your position that the Court has
13 jurisdiction even though the mandate in the case
14 hasn't issued to accomplish that assignment as to
15 Configurations 3 and 5, Mr. Robertson, or do you agree
16 with Mr. Thomasch that that can't be done, however it
17 may be done, either the way you suggest or the way he
18 suggests, until the mandate is issued?

19 MR. ROBERTSON: The Court absolutely has
20 jurisdiction. The Court has had jurisdiction over
21 every motion practice and hearing and everything
22 attached since the jury rendered its verdict.

23 Mr. Thomasch cites no law whatsoever in his
24 letter, and we have cited authority in our letter,
25 excuse me, in our briefing. I'm trying to grab it for

1 you, Your Honor, but I think it's like at page 8, 9,
2 including the *Pfizer* case, the *MPT* case. These are
3 district courts that within days -- and *Broadcom v.*
4 *Qualcomm*, I apologize -- within days, even one day
5 after the Federal Circuit affirmed and modified an
6 injunction that they entered an order enforcing the
7 injunction as directed by the Federal Circuit.

8 I mean, respectfully, sir, I've been telling
9 my colleagues here, this is not a ping-pong match. I
10 mean, we're not going back and forth on these things
11 all the time. We should have an order that,
12 respectfully, we submitted that is consistent with
13 what the Federal Circuit said and carves out the one
14 configuration and, you know, we should be done.

15 THE COURT: I think that's not really
16 Mr. Thomasch's point. Those were cases, as I recall
17 them, in which there was no petition for rehearing
18 pending.

19 Let me ask you this question: What is your
20 view as to whether the Court has authority to modify
21 an injunction that it's issued once that case is on
22 appeal and the injunction is before the Court on
23 appeal? The answer is clearly that the Court doesn't
24 have the power to modify it, does it?

25 MR. ROBERTSON: Of course it does, Your

1 Honor. It's not modifying the injunction. In fact,
2 if anything, it's constricting, it's restraining, it's
3 narrowing an injunction that it already issued.

4 Your Honor has an injunction with respect to
5 three configurations. All you're doing is carving out
6 one configuration. Obviously, you can reduce
7 something consistent with an appellate court's ruling
8 that says, "Issue an order consistent with our
9 ruling." Respectfully, sir, that's all you need to
10 do, and, you know, not revisit the issue.

11 THE COURT: That's not the issue of whether
12 we revisit it. It's whether I can do what you say.
13 You're confusing apples and oranges, Mr. Robertson.
14 The question is one of authority and power. That's
15 what Mr. Thomasch is raising.

16 Isn't it, Mr. Thomasch?

17 MR. THOMASCH: Your Honor, I have raised both
18 issues. But you are correct. I do think that there
19 is a question. I don't think the answer to it is
20 black and white, Your Honor, because I cannot find a
21 situation in the reported cases where during the
22 pendency of the appeal where the Court had indicated
23 that a modification was necessary, a modification was
24 made, even though the appeal was still ongoing through
25 this reconsideration motion.

1 I think we are in very, what I would call,
2 uncharted waters here, and I, frankly, do not agree
3 that the Court has the authority to do it, but I have
4 not found a case on it either way. I think that there
5 are reasons I won't go into unless requested by the
6 Court that the Court should not do that even if it
7 could.

8 THE COURT: Well, I understand that, and I
9 appreciate it because your research and my look is the
10 same, and I think that's what the briefs tell me, too.

11 MR. ROBERTSON: I would ask Your Honor to
12 look at the *Broadcom* case because that was done within
13 a day after the decision was rendered on an
14 injunction. I would also ask you to look at the *MPT*
15 case.

16 THE COURT: Let me ask you, Mr. Robertson,
17 did either of those cases, and I think there are two
18 more in those pages of your briefs that you cited, do
19 any of those cases involve a pending petition for
20 rehearing at the time that the modification was made?
21 I think the answer is no.

22 MR. ROBERTSON: I think you're right, Your
23 Honor, but let me just make this point. That is with
24 respect to claim 26, there is no petition for
25 rehearing by Lawson. With respect to claim 26, there

1 is no request for certiorari to the Supreme Court.
2 With respect to claim 26, it's been infringed and
3 ongoing for 20 months.

4 THE COURT: I understand all of the points
5 that you're making, Mr. Robertson. Here's something
6 that both of you need to learn. We can't in resolving
7 any single question resolve all the questions that are
8 on the table at any given time. And it is permissible
9 to answer just the question that was asked and to
10 address just the question that was asked. And you
11 don't in doing that waive all of the other things.

12 And both of you are smart enough to know how
13 to answer something without waiving the future
14 implications of whatever your answer bodes if it's
15 worth preserving. And I really wish you would try in
16 your papers and in your discussions to proceed that
17 way.

18 Now, Mr. Thomasch, what is it that you want
19 oral argument on as mentioned in your letter of the
20 9th of January?

21 MR. THOMASCH: Two things, Your Honor.
22 First, we would like oral argument on whether and what
23 scope a new injunction should have. Whether a new
24 injunction should issue and what scope it should have.
25 You asked for position statements. We've given them.

1 We would like oral argument on that issue.

2 The second thing we would like oral argument
3 on is in the event that you reenter an injunction in
4 some modified format, what will be the context of the
5 contempt proceeding? How will we proceed forward?
6 And that will include issues about the time period
7 that is subject to the contempt proceeding and whether
8 or not the TiVo issues that we've previously submitted
9 letters to the Court on both sides about is going to
10 be conducted before we have the hearing on contempt.

11 So we would ask for oral argument on both
12 whether and what scope of injunction and how to
13 proceed forward on contempt.

14 THE COURT: All right. I don't know that I
15 need argument on either one of those things at this
16 stage. You-all have briefed them about as thoroughly
17 as you can brief them.

18 You said that you have discussed,
19 Mr. Robertson, the dates for hearings, and I'm not
20 sure whether you had discussed them with your
21 witnesses or had discussed them with Mr. Thomasch.
22 Which did you mean?

23 MR. ROBERTSON: Well, Your Honor, I have not
24 discussed them with Mr. Thomasch, but I certainly
25 will. We just got your order a few days ago and we

1 called our experts and checked their availability.

2 THE COURT: The only order you should have
3 gotten was one asking you to submit a sketch order,
4 which is fairly common in this district. If you're
5 asking for something, usually a sketch order is
6 tendered.

7 Is there any other order that I issued that I
8 didn't realize I issued?

9 MR. ROBERTSON: I think you issued an order
10 saying what should be consistent with the Federal
11 Circuit's decision and when can we -- I don't have it
12 in front of me right now, Your Honor, but what I
13 realized was I needed to contact my experts so I can
14 be responsive to any kind of schedule that you might
15 set. So --

16 THE COURT: Excuse me, though. What order
17 are you talking about, Mr. Robertson, that's been
18 issued? That order requiring statement of positions
19 was a couple months ago. I issued an order earlier in
20 the week, I think it was, or the end of last week,
21 asking ePlus to submit a sketch order for the form of
22 the revised injunction that it proposed and said in
23 accord with your papers in the statements of position.

24 Is there any other order that you're talking
25 about other than that one because if there is, I don't

1 know it?

2 MR. ROBERTSON: No, sir. That's the order
3 I'm talking about.

4 THE COURT: All right.

5 MR. ROBERTSON: I apologize. I was reading
6 between the lines. I was thinking that we were going
7 to proceed with the contempt proceedings.

8 THE COURT: Well, we might. I don't know.
9 But what I was doing was asking you to do what usually
10 is done here, and that is let me see the form of the
11 order you propose, which is a fairly consistent
12 practice in this court, I think, for injunctions, and
13 that's all I was doing at the time.

14 MR. ROBERTSON: I understand, sir.

15 THE COURT: I'm sorry if I elevated your
16 heart rate.

17 MR. MERRITT: This is Craig Merritt. Could I
18 mention something in connection with your
19 jurisdictional question from a few moments ago?

20 THE COURT: Sure. I always want to know
21 about jurisdiction.

22 MR. MERRITT: It's obviously important, and
23 in thinking about it, it seems that one question that
24 needs to be answered is this: When the Court entered
25 its order in May of 2011, its injunction order, it

1 certainly retained jurisdiction going forward to
2 enforce that order.

3 Efforts were made, as I recall, by Lawson,
4 both in the District Court and the Federal Circuit to
5 stay the enforcement of the order, which were rejected
6 by the District Court and the Federal Circuit.

7 That being the case, I would be curious to
8 know the answer to the question: When did the Court
9 lose jurisdiction?

10 THE COURT: Upon the filing of a notice of
11 appeal, I would suppose. But you always retain the
12 power -- the jurisdiction to exercise contempt because
13 that is an independent question, to exercise the power
14 of contempt.

15 MR. MERRITT: I think that's the relevant
16 question. We seem to be assuming that the Court lost
17 jurisdiction at some point and I'm trying to discern
18 when that happened.

19 THE COURT: Well, I don't think there was
20 ever any loss of jurisdiction over the question of
21 contempt. That's an inherent question. The question
22 is:

23 (A) Was the issuance vel non of the
24 injunction an issue on appeal? And if so, while that
25 is pending does the Court have the authority to modify

1 the injunction at all until the appellate court
2 decides the issue?

3 MR. MERRITT: Understood. I guess the reason
4 I raised the question was to be sure that we tease
5 apart questions of fundamental jurisdiction from other
6 jurisprudential matters that don't actually go to the
7 Court's power over its injunction.

8 MR. ROBERTSON: Your Honor raised a good
9 point with respect to the appeal. I mean, the scope
10 of the appeal on the injunction was not as to any of
11 the four factors under the *eBay* test. It was only
12 under the scope as to the argument that Lawson
13 couldn't maintain or support or, you know, enhance the
14 existing software. And that was expressly rejected.

15 So, Judge, one of the things we try to
16 emphasize is *res judicata*. We've got an appellate
17 verdict now on claim 26 that is supported on
18 Configurations 3 and 5 of your injunction. And it's
19 not then a petition for rehearing certainly by Lawson.

20 So we would like to enforce that at long
21 last, Your Honor.

22 THE COURT: I understand. All right. I will
23 issue an order shortly. I just needed to sort a
24 couple of things through with you.

25 MR. THOMASCH: Your Honor, it's Mr. Thomasch.

1 May I ask one question?

2 THE COURT: Yes.

3 MR. THOMASCH: And that is whether Your Honor
4 is going to set forth some procedure that would lead
5 up to a contempt hearing. And we have not taken the
6 position that you lost authority for a contempt
7 hearing at all. We've never taken that position. But
8 if there is going to be a contempt proceeding, for
9 instance, Your Honor, the damages are completely
10 different now that we're talking about only a small
11 fraction of the customers who possess the
12 configuration that's been found to infringe compared
13 to what was the case earlier. And we would anticipate
14 that ePlus would be putting in a new damages report.
15 We would want to have time to study that and to
16 respond accordingly.

17 We do not believe that the liability
18 witnesses should be able to put in new statements
19 because the issue of the colorability of the change
20 and the infringement, those issues were previously
21 dealt with by the parties.

22 We do think that there are some witnesses
23 that are no longer necessary to the case because they
24 were going to deal with issues that relate to the '172
25 Patent, which is no longer in play.

1 We don't believe that claims 28 and 29 are in
2 play because they were found to be not infringed, but
3 we would like to know, for instance, resubmitting
4 exhibit lists so that exhibits both are pared down to
5 get rid of those that related to the patent that is
6 now invalid or the claims that are now infringed, but
7 to add any exhibits that might have come out of the
8 privilege documents that were produced pursuant to
9 order of the Court after our original document exhibit
10 lists were compiled.

11 So we do think that there are some timing and
12 procedural issues that we would ask the Court to
13 address in any scheduling order that might issue.

14 MR. ROBERTSON: Your Honor, this is Mr.
15 Robertson. And you might find this very surprising,
16 but I am somewhat in agreement with Mr. Thomasch. We,
17 obviously, need to address the damages issue. I don't
18 think they are miniscule compared to what we were
19 talking about before, but we'll leave that aside and
20 try and be positive.

21 THE COURT: You think they are miniscule? Is
22 that what you said?

23 MR. ROBERTSON: That's what he said. I
24 disagree with what he said. They are substantive and
25 significant and the Court has significant authority

1 once it finds contempt to either multiply and add
2 attorneys' fees, as we've already briefed.

3 But having said that, we do need to look at
4 the new exhibits that may be necessary given the fact
5 that the Court ordered that 3,000 privileged documents
6 be produced. We had a discussion this morning. We're
7 going to try to narrow this as much as possible. But
8 this is a much more focused hearing now than we were
9 concerned about before because we're only going to
10 focus on the two configurations, and we're going to
11 put together our narrowed exhibit list and narrowed
12 witness list.

13 And so what I should do is not waste the
14 Court's time, but get off line with Mr. Thomasch and
15 see if we can work out who we think are now necessary
16 witnesses and how long this hearing can take.

17 THE COURT: When do you propose to have this
18 hearing on contempt?

19 MR. ROBERTSON: When do I propose, Your
20 Honor?

21 THE COURT: Yes.

22 MR. ROBERTSON: The week of February 18 would
23 be ideal, but I don't know what the Court's docket is.

24 MR. THOMASCH: Your Honor, that would
25 certainly not be ideal for Lawson based on trial

1 schedules of counsel. We also do not believe it would
2 leave time to do the necessary work, particularly with
3 regard to understanding the damages, and there are
4 many moving parts at the moment, Your Honor.

5 We would also, Your Honor, Mr. Thomasch
6 speaking on behalf of Lawson, we would also ask that
7 the Court schedule a hearing with regard or a
8 procedure with regard to the TiVo allegations, what
9 was contended and proved. And I think that it could
10 not be more clear that that is necessary than the
11 claim that appeared in ePlus's papers that they may
12 seek a contempt hearing on claims 28 and 29 of the
13 '683 Patent, which were found to be not infringed by
14 the Federal Circuit.

15 So, I frankly do believe we have a
16 fundamental right to know what the contempt proceeding
17 is going to be. The Court clearly has the power to
18 have a contempt proceeding, but we would like to know
19 what it is. And we would like to have sufficient time
20 to prepare for the new hearing and one that doesn't
21 conflict with an existing trial schedule.

22 MR. ROBERTSON: Respectfully, Your Honor, the
23 Federal Circuit told Lawson what was infringed, and
24 what the jury found, and the substantial evidence that
25 was there. They said it was clear that Lawson and its

1 customers are infringing. I don't know why we have to
2 agonize over all this.

3 So, I mean, it's clear to me that Lawson
4 wants to do whatever it can to delay enforcement of an
5 order this Court's entered enjoining them 20 months
6 ago. And every step they have taken, that's what they
7 have done.

8 So, Your Honor, we are available at your
9 convenience.

10 MR. THOMASCH: Your Honor, Mr. Thomasch.

11 THE COURT: Yes, I'm sorry. I'm looking at
12 my book. What did you say, Mr. Thomasch?

13 MR. THOMASCH: Your Honor, two things. One,
14 we would ask that before there is a contempt
15 proceeding, the Court enter the modified injunction.
16 You understand, obviously, we have objections to your
17 doing so without a further hearing, and we don't know
18 what findings you will make in connection therewith,
19 but that's a separate issue.

20 If Your Honor has decided to go forward and
21 enter a revised injunction, we would ask certainly
22 that that happen before the hearing on contempt. We
23 would like to schedule the necessary preliminaries for
24 that, and then we would like to have a date sometime
25 on or after the 18th of March. We do not seek delay

1 for the sake of delay, Your Honor, at all.

2 Indeed, the delays that have come out of
3 this, the current delay, frankly, is because ePlus,
4 not Lawson, made a motion for reconsideration in the
5 Federal Circuit. We did not move to reconsider it.

6 We think we're in good shape where we're at,
7 and we're prepared to move forward, but there are a
8 lot of rights at issue. There are very significant
9 issues to be briefed, argued, and evidence to be
10 presented, and we would like it done in a normal,
11 orderly fashion.

12 Ultimately, it doesn't matter when the
13 hearing takes place. If Mr. Robertson is right,
14 damages will be assessed for the entire time period
15 prior to the judgment and he will be made whole. I
16 don't think he is right and I don't think that day
17 will come.

18 MR. ROBERTSON: Your Honor, let me just tell
19 you, a couple of things Mr. Thomasch just said are
20 landmines that he wants you to step on. And that is
21 modified injunction, revised injunction, because I
22 guarantee you he's already signaled it to you in his
23 letter that they will now file for a new appeal, and
24 that will be what he wants to do to delay.

25 And so it's not a modified injunction. It's

1 simply an injunction consistent with what the Federal
2 Circuit's decision of the scope of the injunction is.
3 That is his trap.

4 MR. THOMASCH: Your Honor, I really do try
5 not to rise to the bait.

6 MR. ROBERTSON: Well, tell the Judge you're
7 not going to appeal.

8 THE COURT: Hey, hey, Mr. Robertson. You
9 know, I fell off the turnip truck, but it wasn't
10 yesterday. Come on. I think I understand what the
11 implications of various and sundry procedural steps
12 are. I don't need to be dealing with that right now.

13 MR. ROBERTSON: I apologize, Your Honor. I
14 apologize.

15 THE COURT: All right.

16 MR. THOMASCH: Your Honor, it's Mr. Thomasch.
17 And I will answer your question completely and
18 straightforwardly.

19 The Court said that you are to consider what
20 changes are required to the terms of the injunction.
21 Your Honor has the authority and the discretion to
22 enter a modified injunction. We object to your doing
23 so, and we don't believe that the four-factor test is
24 met, but you have the power to proceed, and it is
25 subject to an appeal under 1292(a)(1). We have not

1 hidden that.

2 And if Your Honor goes forward and enters an
3 injunction without a hearing on the injunction and
4 without reassessing whether the four factors remain
5 valid in light of the limitation of this case to claim
6 26, then I fully expect that we will take an appeal of
7 that order. But that's our prerogative to do so.
8 It's not meant to delay anything.

9 Injunctions are very serious business. And
10 Rule 65 has requirements for what must be an
11 injunction. And for ePlus to argue that this is not a
12 modified injunction is simply wrong. The Court has
13 eliminated the system claims that were the fundamental
14 predicate for the injunction, and if an injunction is
15 to be reentered, it is a modified injunction, and,
16 frankly, 1292(a)(1) gives the Federal Circuit
17 jurisdiction over any granting, continuing, modifying,
18 refusing, or dissolving, or refusing to dissolve an
19 injunction.

20 So it doesn't matter what it's called. The
21 circumstances have changed dramatically by virtue of
22 the system claims having been eliminated. We believe
23 that the system claims were the predicate for the
24 evidence at the hearing in April of 2011. They are
25 what the Court points to in the decision of May 23,

1 2011. And if there is no new findings that an
2 injunction is warranted with regard to claim 26
3 standing alone, then I do anticipate an appeal.

4 It is not a trap. It is not a threat. It is
5 nothing other than counsel speaking to the Court
6 candidly about how we see the case and why we think
7 that we have certain rights that if we are not given
8 them in the District Court, we will take an appeal.
9 That's the process.

10 In the meantime, we will appear on the date
11 you set, and we will defend a contempt hearing, and we
12 will expect to win that contempt hearing. The issue
13 of the injunction will continue regardless of the
14 outcome of the contempt hearing, but it is not a trap.
15 I just want to make that clear.

16 THE COURT: Okay. Let's see. I guess the
17 issue now is now that the course in equity procedure
18 and civil procedure has been concluded, how is the
19 student going to perform? Will he get an A, or a D,
20 or an F? So that's in my court to deal with now, and
21 I appreciate it.

22 What do you-all look like on April 1 for the
23 date of the contempt hearing? And if I decide that I
24 need to at the same time deal with the injunction, I'd
25 like to do it all at one time, if I need to deal

1 further with the injunction in the way that Mr.
2 Thomasch says or proceed as Mr. Robertson says.

3 MR. THOMASCH: Your Honor, while early April
4 works well, I would ask possibly that consideration to
5 move to the 2nd for witnesses to the extent that any
6 of the witnesses are celebrating Easter, which is on
7 the Sunday before Monday, April 1. It might be
8 somewhat difficult to get them to leave their
9 families, come and sit down with lawyers. Lawyers are
10 used to being out of town at any time, but sometimes
11 the witnesses are a little balky.

12 THE COURT: Well, there are subpoenas that
13 eliminate that problem, Mr. Thomasch.

14 MR. THOMASCH: That's true, Your Honor. I
15 just wanted to let the Court know.

16 THE COURT: I know it's Easter Sunday. I
17 don't want to work on Easter Sunday either, but I have
18 other matters to deal with and to schedule around.

19 MR. ROBERTSON: Your Honor --

20 THE COURT: How do you look on March the
21 25th, gentlemen? That looks like the best date I
22 have.

23 MR. ROBERTSON: I hate to tell you this, Your
24 Honor, but -- Mr. Robertson. I have four kids, and my
25 wife just booked a spring vacation for their spring

1 vacation, and that week is really bad for me.

2 THE COURT: Do you know where the nicest
3 place to spend a spring vacation is, Mr. Robertson?

4 MR. ROBERTSON: In Richmond, Virginia?

5 THE COURT: It's where Lincoln was filmed.
6 Williamsburg is close by. Jamestown is close by.
7 We're two hours from the ocean, and two hours from
8 Washington, and two hours from the mountains, and it's
9 for lovers. So come on.

10 MR. ROBERTSON: I've done it a lot, Your
11 Honor. Williamsburg, too. But it's nonrefundable
12 where I am right now.

13 THE COURT: Mr. Robertson, let me tell you
14 something. There are a lot of things that I pay
15 attention to, but nonrefundable tickets by lawyers
16 that make the amount of money you-all make is not one
17 of them.

18 MR. ROBERTSON: All right, sir.

19 THE COURT: I know you affect the old boy
20 image because you're driving a truck, but enough's
21 enough.

22 MR. ROBERTSON: I'm not sure I agree with Mr.
23 Thomasch on the 2nd. That doesn't give me much time
24 to get back and get prepared.

25 THE COURT: How about the 18th? It may be

1 better to do it the week of the 18th.

2 MR. ROBERTSON: Of April?

3 THE COURT: No, of March. March 18.

4 MR. ROBERTSON: I will check with my experts.

5 Ms. Albert, you're on the phone.

6 THE COURT: How many experts do you have?

7 MR. ROBERTSON: Two plus the damages.

8 THE COURT: All right. You pay them and tell
9 them to be here. Unless they're going into the
10 hospital or have a prior court commitment, they get
11 here or get yourself another expert.

12 MR. ROBERTSON: Understood.

13 THE COURT: How about the 18th?

14 MR. THOMASCH: Your Honor, we could do
15 March 18 and we would have a preference for April 1.

16 MR. DUSSEAUT: Your Honor, this is Chris
17 Dusseault. If I could just factor one thing in that
18 is personal to me. I have a case I've been working on
19 for about 3 1/2 years. It's being argued in the
20 United States Supreme Court on the 26th of March. So
21 given the time that will be going into that, the 2nd
22 or the 1st of April will be much better for me, but,
23 obviously, I will live with whatever the Court needs
24 to do.

25 THE COURT: All right.

1 Are there any other dates that you all need
2 to check with your experts?

3 MR. THOMASCH: We have not checked with ours,
4 Your Honor.

5 MR. ROBERTSON: We could email you later this
6 afternoon, Your Honor.

7 THE COURT: What?

8 MR. ROBERTSON: We could give you some
9 guidance and email you later this afternoon, but if
10 you're into March, we think we're okay.

11 THE COURT: I can also make some changes and
12 do February the 25th, that week, or during that week.

13 MR. THOMASCH: That is much less convenient
14 for us, Your Honor. This is Mr. Thomasch for Lawson
15 for the court reporter's benefit.

16 MR. ROBERTSON: Well, for ePlus this is
17 Mr. Robertson, that would be more desirable, but, you
18 know, we are subject to the Court's pleasure.

19 THE COURT: I can assure you this: There
20 isn't any pleasure that's taken in any of this other
21 than the pure intellectual challenge and the joy of
22 dealing with you-all.

23 All right. So what I want you to look at, I
24 want you to look at, for your experts, at the weeks of
25 March the 11th, March the 18th, February 25th, and

1 April the 2nd, and I'm going to see if I can get rid
2 of a case on March the 11th. One of my colleagues
3 said he wasn't busy and needs some work and I'll be
4 glad to lateral this particular case to him. Then we
5 can do it.

6 So you-all check with your experts. I am
7 sympathetic with people's spring vacations. I am
8 sympathetic with all the things that have been raised,
9 but this has been going on a tremendously long time.
10 So check with your experts, check with your witnesses,
11 and give me your dates in preferred order. That would
12 be February 25, March 11, March 18, April 2.

13 MR. THOMASCH: We will do so, Your Honor.

14 THE COURT: All right. Then let me know that
15 on Monday, will you, please?

16 MR. THOMASCH: Yes, sir.

17 THE COURT: All right. And then we'll --

18 MR. ROBERTSON: Thank you.

19 THE COURT: We'll then proceed from there to
20 shape some of the other things that need to be shaped.

21 I've heard, I think, what you have to say.

22 I've read everything you have to say. And I just have
23 a couple of things I need to sort out now.

24 I may ask you to come on notice to orally
25 argue these two points that you say you want to argue.

1 I don't think it's needed, Mr. Thomasch, but I don't
2 see that taking more than an hour or so. Do you? Two
3 hours?

4 MR. THOMASCH: I think two hours will be
5 fine, Your Honor. We did attempt to stay responsive
6 to your position statement request, so we did not
7 argue at length whether or not the four-factor test
8 would be satisfied by the evidence in the record.
9 And, obviously, that's an issue we would wish to
10 address with the Court.

11 THE COURT: I understand, I think, the
12 implications of what your points are.

13 All right. Thank you very much. You-all
14 have a nice weekend.

15 MR. THOMASCH: Thank you.

16 THE COURT: Bye.

17

18 (The proceedings were adjourned at 12:07 PM.)

19

20 I, Diane J. Daffron, certify that the
21 foregoing is a correct transcript from the record of
22 proceedings in the above-entitled matter.

23

/s/

24

DIANE J. DAFFRON, RPR, CCR

DATE

25